

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CHAD YONAKA,

Plaintiff,

v.

UNITED PARCEL SERVICE INC. and  
HIGHWAY DRIVERS, DOCKMEN,  
SPOTTERS, RAMPMEN, MEAT, PACKING  
HOUSE AND ALLIED PRODUCTS DRIVERS  
AND HELPERS, OFFICE WORKERS AND  
MISCELLANEOUS EMPLOYEES, LOCAL  
UNION 710,

Defendants.

Case No. 05-cv-4136-JPG

**MEMORANDUM AND ORDER**

This matter comes before the Court on defendant Local 710's motion to dismiss with prejudice and defendant United Parcel Service's (UPS) motion to dismiss without prejudice (Doc. 16 and 19, respectively). Both motions are based upon a failure to serve process in a timely manner. The plaintiff has responded to these motions (Doc. 27).

Plaintiff, Chad Yonaka, a truck driver for UPS, brings a claim originating from a traffic accident he had while driving for UPS. Yonaka concedes untimely service and also concedes that the Court must dismiss the action; however, Yonaka contests dismissal with prejudice.

Federal Rule of Civil Procedure 4(m) states that "[i]f service of the summons . . . is not made [in a timely fashion], the court . . . shall dismiss the action without prejudice . . . ." Fed. R. Civ. P. 4(m); *see also Powell v. Starwalt*, 866 F. 2d 964, 965 (7<sup>th</sup> Cir. 1989) (stating that Rule 4(j), now the amended Rule 4(m), provides for dismissal without prejudice). Further, the defendant Local 710 provides no justification for a dismissal with

prejudice in its motion or its brief, nor can the Court find any justification through its independent research.

Because Rule 4(m) controls, because the defendant has advanced no clear arguments in support of a dismissal with prejudice, and because the plaintiff concedes that dismissal without prejudice is appropriate, the Court will dismiss this case without prejudice.

For these reasons, the Court **GRANTS** Defendant Local 710's motion to dismiss (Doc. 16), but will dismiss the claims against Local 710 without prejudice, **GRANTS** Defendant UPS's motion to dismiss (Doc. 19) the claims against it without prejudice, and **DISMISSES** these claims without prejudice. The Court **DIRECTS** the Clerk of Court to enter judgment accordingly.

**IT IS SO ORDERED.**  
**DATED: June 12, 2006**

s/ J. Phil Gilbert  
**J. PHIL GILBERT**  
**DISTRICT JUDGE**